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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-1152

CEMENT MASONS UNION LOCAL 337, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES, AND CANADA, AFL-CIO, *Petitioner*,

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

CEMENT MASONS UNION LOCAL 337, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES, AND CANADA, AFL-CIO; Its President, BILLY J. GARDNER; Its Business Agent, PHILIP NELSON, and Its Pickets, *Petitioners*,

vs.

ROY O. HOFFMAN, Regional Director of the Twentieth Region of the National Labor Relations Board, for and on Behalf of the NATIONAL LABOR RELATIONS BOARD, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of

Appeals for the Ninth Circuit entered in the above-entitled consolidated cases on November 21, 1972 and December 29, 1972.

CITATIONS TO OPINIONS BELOW

In *NLRB v. Cement Masons Local 337,* the decision and order of the National Labor Relations Board was issued on May 4, 1971, and its supplemental decision was issued on July 30, 1971. The Board's decision and order and supplemental decision are reported at 190 NLRB No. 46 and 192 NLRB No. 52, attached in Appendix B hereto, *infra,* page 3. The opinion of the Court of Appeals is reported in ..... F.2d ....., attached in Appendix B hereto, *infra,* page 50.

In *Roy O. Hoffman v. Cement Masons Local 337, et al.,* the order of the District Court was entered November 5, 1970. There is no reported opinion. The opinion of the Court of Appeals is reported in ..... F.2d ....., attached in Appendix B hereto, *infra,* page 50.

JURISDICTION

The judgment of the Court of Appeals was entered December 29, 1972, in *Hoffman v. Cement Masons Local 332, et al.,* and *NLRB v. Cement Masons Local 337,* was entered on November 21, 1972. The jurisdiction of this Court is invoked under 28 USC §1254(1) and 29 USC §160(e).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board may foreclose all picketing in the construction in-

dustry, directed at consumers and limited to a request not to purchase the product of a primary employer.

2. Whether the National Labor Relations Board foreclosing all picketing in the construction industry, directed at consumers and limited to a request not to purchase the product of a primary employer, is a violation of the guarantees of free speech and equal protection afforded by the United States Constitution.

3. Whether foreclosing handbilling in such a situation violates the publicity proviso to Section 8(b)(4) of the National Labor Relations Act.

4. Whether the findings of the Trial Examiner, adopted by the Board, and by the Court of Appeals are supported by substantial evidence.

5. Whether handbilling can be the basis of a contempt order for violation of an injunction prohibiting picketing.

STATUTES INVOLVED

The statutory provision involved is Section 8(b)(4)(ii)(B) of the National Labor Relations Act, 61 Stat. 136, 73 Stat. 519, 29 USC §158(b)(4)(ii)(B) (1970). It is attached in Appendix A, *infra*, page 1.

STATEMENT

Howard H. Whitney ("Whitney") is an individual proprietor doing business as a general contractor in the building and construction industry. Ted Shuler, d/b/a Shuler Investments ("Shuler") is a developer

engaged in the business of selling and renting homes and apartment houses. At all times material, Shuler engaged Whitney as the general contractor on a group of homes to be sold by Shuler, known as Oak Hills.

Beginning on May 2, 1970, Cement Masons Union Local 337 ("Union") patrolled the entrance to the Oak Hills project on Saturdays and Sundays only, with a sign reading

> To Consumers Only. Cement Masons work done by general contractor below standards established by Cement Masons Local 337, Monterey County. Please do not purchase these homes.

This week-end picketing reached no employee, delivery or materialman since no work was done on the week-end.

On August 15, 1970, a representative appeared at the entrance of the Oak Hills project with a sign reading (Tr. 7, 47-51):

> I am a Cement Mason Union handbiller. Please take my handbill.

The handbill stated (Tr. 47):

> To Consumers Only. Please do not purchase these homes. The general contractor constructed these homes using persons to perform Cement Masons' work below standards established by Cement Masons' Unions in this area.

Whitney's compensation to his employees was $6.83 per hour (Tr. 84-85). Union members are compensated at $7.58 per hour (Tr. 108-111). Shuler owns

and rents other houses and apartments and has houses under construction by other contractors (Tr. 78-80). The Union was not certified as the collective bargaining representative of Whitney's employees and made no demands upon Whitney for recognition. The Union had no dispute with Shuler.

On these facts the Board affirmed the Trial Examiner's decision finding the Union's conduct to be unlawful. The Board's order was enforced by the Court of Appeals. The District Court enjoined the original picketing pending the Board's final determination. The subsequent handbilling was found to be a civil contempt.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below is in clear conflict with this Court's opinion in *NLRB v. Fruit and Vegetable Packers (Tree Fruits)*, 377 U.S. 58, 12 L.Ed.2d 129 (1964). *Tree Fruits* permits secondary picketing, limited to an appeal not to buy the product of the primary producer. Whitney, as the general contractor, was responsible for delivering finished houses to Shuler. The Union did no more than request consumers not to purchase these houses. Both the Board and the Court of Appeal, in essence, adopt the test specifically rejected by this Court in *Tree Fruits*, *viz.*, whether the secondary (Shuler) suffered or was likely to suffer economic loss. *Tree Fruits* permits an appeal that does not go beyond the product of the primary (Whitney).

One must focus on whether the Union has appealed to the public not to purchase any or all of the goods of the secondary (Shuler), rather than limiting itself only to the product the secondary has of the primary. This is exactly what the Union did in the instant case. It is undisputed that the secondary (Shuler) had other homes and apartments under construction, and for sale, and for rent (Tr. 78-80). The Court of Appeals failed to apply this test.

2. The decision of the Court of Appeals is in direct conflict with the decision of this Court in *Tree Fruits* in that this Court, in *Tree Fruits,* held that one must look to see whether the Union followed the struck product, and not determine the lawfulness or unlawfulness of the activity based on the *effect, i.e.,* whether the secondary would be coerced into ceasing business with the primary (Whitney). *Tree Fruits, supra,* at 70, 72-74. The Court of Appeals, in the instant case, adopted the Board interpretation that if the picketing coerced the secondary (Shuler) to cease doing business with the primary (Whitney), then such conduct was proscribed. Opinion at page 5, Appendix B, *infra,* at 55-56.

3. The question of consumer picketing in the construction industry is of vital importance to the proper administration of the National Labor Relations Act. The effect of the decision of the Court of Appeals enforcing the Board is to preclude *any and all* consumer picketing in the construction industry. The Court of Appeals held that a construction site is a "one product site" and that no consumer picketing or

handbilling can occur at such a site. Slip opinion, page 4, Appendix B, *infra*, page 54. There is nothing in the National Labor Relations Act which defines or suggests that a construction site is a "one product site" for the purposes of consumer picketing. The Court of Appeals relied on *NLRB v. International Union of Operating Engineers, Local 825*, 400 U.S. 297, 302-03, 27 L.Ed.2d 398 (1971). This case is *inapposite* because it deals with work stoppages and strikes against secondary employers and not with consumer picketing limited to the product of the primary employer.

The practical effect of holding a construction site a "one product site," is to foreclose entirely the possibility of ever entertaining consumer picketing at a construction site. However, in the instant case, the Union limited its appeal solely to the product of Whitney, the general contractor.

4. It is important to the proper administration of the National Labor Relations Act to define "sole product sites". The Court of Appeals, in the instant case, defined construction sites as "sole product sites". *Tree Fruits, supra*, at 70, only proscribes consumer picketing to "shut off *all* trade with the secondary employer". (Emphasis added.) As pointed out in the preceding number, the secondary (Shuler) did not suffer picketing to shut off *all* trade with him.

5. The rule preventing consumer picketing at "sole product sites" denies construction workers the equal protection of the law. The effect of the ruling in the Court of Appeals is to prevent construction workers,

in any phase of construction, to ever engage in peaceful consumer picketing. The Court of Appeals restricts picketing in this type of case because it results in the "proscribed coercive effects" on a secondary employer, which effect is that the secondary may cease doing business with the primary. Opinion at 5, n. 1, Appendix, *infra,* at 55. *Tree Fruits,* however, recognizes that the cessation of business between the secondary and primary is a possible consequence in all consumer picketing. Therefore, this effect of the picketing cannot be used as the basis for proscribing the conduct. Rather, what *Tree Fruits* teaches is that the *manner* in which the picketing is conducted is what must be focused on. Since the manner in which the picketing was conducted in the instant case is the same as the manner used in *Tree Fruits,* and in other instances where consumer picketing is lawful, we are left here with a class of persons, Unions and their members in the construction industry, who are prohibited from engaging in the same conduct and manner of conduct as all other Unions.

6. There is a conflict between the Circuits about identifying a "product". In *American Bread Company v. NLRB,* 411 F.2d 147, 71 LRRM 2243 (6th Cir. 1969), the Court enforced the Board's order holding that consumer picketing may not be engaged in when the struck product is so merged with other products that it loses its identity. However, in *Honolulu Typographical Union, Local 37 v. NLRB,* 401 F.2d 952, 68 LRRM 3004, 3007 (D.C.Cir. 1968) the Court stated that consumer picketing is foreclosed

when the item is one that the consumer does not recognize, absent the picketing, as a product. In the instant case, the Court of Appeals held "product" to be defined by geographical location, without regard to any other products that the secondary might have.

Thus, Petitioner is left in confusion. The product of the primary (Whitney), the general contractor, is completed houses, the very object of the picketing in the instant case. If this is held to be a "merged product", as the Court of Appeals in the instant case intimates by citing *American Bread Company, supra,* then we have two standards of what a "merged product" is. If the end product becomes merged because of the addition of goods and services of other employers, then any end product employer, e.g., General Motors, would be immune from consumer picketing. On the other hand, the completed houses are clearly recognized as a product by consumers, satisfying the test in *Honolulu Typographical Union, supra.* Further, neither of the Circuits in *American Bread Company* and *Honolulu Typographical Union* define product in terms of geographical location as is done in the instant case.

7. Substantial evidence does not support the finding of the Trial Examiner, enforced by the Court of Appeals, that the handbilling was untruthful. The record is clear that the primary (Whitney) paid a total of $6.83 in wages and fringes (Tr. 84-85). The record is equally clear that the Union's members received $7.58 per hour in wages and fringes (Tr. 108, 111). The Trial Examiner's finding was that the pri-

mary pays $6.83 an hour while Union members are paid $6.73 an hour (R., page 26). The Trial Examiner simply omitted, in making the calculation on behalf of the Union, some of the fringe benefits. There is absolutely no factual or credibility finding on the part of the Trial Examiner which explains why he did not include all fringes in the determination of the Union's wage package. Further, Union members received hourly differentials for scaffold work and for hazardous materials work (Tr. 112). The Trial Examiner omitted to include these figures in his determination of Union wages, but made no finding that these hourly wage differentials do not constitute wages. Therefore, upon the record, the handbills were true. Therefore, there can be no basis for the Trial Examiner's finding that either the Union's claims were false or were made with knowledge of, or in reckless disregard for the truth. Opinion, at 5, Appendix, *infra,* at 56. The mere fact that the Union did not ask the primary, with whom it had this dispute, for the amount of his wages, cannot establish wanton disregard of the truth. Thus, the handbilling cannot be taken without the provisions of the publicity proviso of Section 8(b)(4)(ii)(B) (29 USC §158(b)(4)(ii)(B).

The publicity proviso is applicable as long as the publicity does not have an effect of inducing any individual, employed by any person other than the primary, to refuse delivery or stop work. The Trial Examiner found that the Union activity occurred on days when no employees of Whitney were present. There was no finding that there was any work stop-

page or any refusal of materialmen or delivery men to deliver. Therefore, the handbilling in the instant case must fall within the publicity proviso.

8. An injunction proscribing picketing cannot be the basis for a determination of civil contempt for handbilling. The injunction issued in the 10(l) proceeding proscribed picketing for an unlawful end. Subsequent to the issuance of this injunction, the Union engaged in handbilling. Since handbilling clearly falls within the publicity proviso, and since it is undisputed that there were no refusals to work and/or refusals to deliver, this handbilling cannot be made to be a violation of an injunction proscribing picketing.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

VICTOR J. VAN BOURG,

Counsel for Petitioners.

On the Petition:

MICHAEL B. ROGER.

Dated: February 14, 1973.

(Appendices Follow)

Appendix A

29 USCA §158. Unfair labor practices.

"(b) It shall be an unfair labor practice for a labor organization or its agents—. . .

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—. . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . . *Provided,* That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged

in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;"

Appendix B

United States of America
Before the National Labor Relations Board
Division of Trial Examiners
Branch Office
San Francisco, California

Case No. 20-CC-1014

Cement Masons Union Local 337, Operative Plasterers' and Cement Masons' International Association of the United States and Canada, AFL-CIO,

and

California Association of Employers

Alan R. Berkowitz, Esq., for the General Counsel.

Levy & Van Bourg, by *Michael B. Roger, Esq.*, of San Francisco, Calif., for the Respondent Union.

Before: *Henry S. Sahm*, Trial Examiner.

TRIAL EXAMINER'S DECISION

Issue

This 8(b)(4)(ii)(B) proceeding involves a real estate development project where new homes are offered for sale, which was picketed by Respondent Union on weekends when no construction employees were working and there is no evidence of interruption with deliveries. The Placards carried by the

pickets read: "I am a Cement Mason Union Handbiller—Please take my *Handbill.*" These handbills stated: "To Consumers Only: Please do not purchase these homes. The General Contractor constructed these homes using persons to perform Cement Masons' work below standards established by Cement Masons in this area."

Statement of the Case

This case, heard at Monterey, California, on September 17 and 18, 1970,[1] pursuant to a charge filed the preceding June 4, and a complaint issued on July 15, involves alleged violations of Section 8(b)(4)(ii)(B) of the Act which prohibits a union from threatening, restraining or coercing secondary employers, where an object of such conduct is to force or require a secondary employer to cease doing business with the primary employer.

Upon the entire record, and after due consideration of the briefs filed by General Counsel and by the Respondent Union on October 26, there are hereby made the following:

Findings of Fact

I. The Business of the Company and the Labor Organization Involved

Howard H. Whitney, an individual proprietor, does business as a general contractor in the building and construction industry with an office in Marina, California. Ted Shuler is also an individual proprietor

[1]Except where otherwise indicated, all other dates herein refer to the year 1970.

doing business as Shuler Investments, with an office in Monterey, California, and is engaged as a developer and builder of homes and apartment houses.

Whitney has been engaged as a general contractor by Shuler working on the construction of a group of single-dwelling track homes known as Oak Hills, near Castroville, California. During the past year, Whitney has performed services for Shuler at the Oak Hills project valued in excess of $50,000. During the same period of time, Shuler has received in excess of $500,000 from the retail sale of homes. Shuler, during the past year, also has received goods valued in excess of $50,000 for use on the Oak Hills project from H & H Supply Co., Seaside, California, which goods were shipped directly to H & H Supply Co. from outside California.

As general contractor for the Oak Hills project, Whitney subcontracted certain portions of the work to seven contractors, who are named in the complaint.[2]

It is found that Whitney and Shuler are each employers engaged in commerce or in operations affecting commerce within the meaning of Section 2 (6) and (7) of the Act. It is found, therefore, that jurisdiction over this matter is warranted.[3]

Cement Masons Union, Local 337, Operative Plasterers' and Cement Masons' International Association

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[2]Marina Carpet, named in the complaint, was deleted from the list of subcontractors by agreement of the parties.

[3]*S. M. Kisner, et al.*, 131 NLRB 1196, 1198-1200; *Siemons Mailing Service*, 122 NLRB 81, 85; *McAllister Transfer, Inc.*, 110 NLRB 1769, 1771-1772.

of the United States and Canada, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

The Testimony

Since May 2, 1970, the Union has picketed the Oak Hills project owned by Shuler, where Whitney, the general contractor, is constructing a group of single-dwelling tract homes for Shuler.[4] The picketing occurred on public property, at the only entrance to the Oak Hills development, on Saturdays and Sundays, when no employees of Whitney or the subcontractors were working at the project, but when approximately 80 percent of the customers examine these homes which Shuler offers for sale. It is undisputed that Respondent members walked back

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[4]Respondent's counsel appears to take issue with characterizing what the Union's representatives were doing as "picketing" when they walked back and forth before the entrance to the housing project holding in their hands a placard upon which was written certain words and distributing leaflets. See General Counsel Exhibits 2 and 3 which are handbills and pictures of the Union's representatives taken in front of the housing project. In this regard, the *Dictionary of Labor Law Terms*, 2d Ed. 1953, page 94, Commerce Clearing House, defines a "picket" as "one who patrols a place of business to publicize the existence of a labor dispute, a union's desire to represent the employees, or the fact of non-union working conditions." The same source defines "picketing" as: "Patrolling by pickets . . . Publicity picketing is intended to indicate to the public the existence of a labor dispute; it has been distinguished by the United States Supreme Court from signal picketing, the intent of which is to persuade other union members to leave their work or to refuse to enter the premises." See *N.L.R.B. v. Local 182, International Brotherhood of Teamsters*, 314 F. 2d 53, 57-58 (C.A. 2); *Local 802, Teamsters v. Wohl*, 315 U.S. 769; *Lumber and Sawmill Workers Local Union, No. 2797*, 156 NLRB 388; 69 Yale L.J. at 1397-1398.

and forth immediately in front of the entrance to the Oak Hills project with placards which read:[5]

I am a
Cement Mason
Union Handbiller
Please take
My *Handbill*

The Respondent Union's pickets also began to distribute handbills on or about August 15, which read:

TO CONSUMERS ONLY:

Please do not purchase these homes. The General Contractor constructed these homes using persons to perform Cement Masons' work below standards established by Cement Masons' Unions in this area.

It was stipulated that at no time did the Union make any oral or written demands of Whitney or his

[5]The record is not clear as to the exact dates handbilling commenced and picketing started. Respondent's counsel stated, "That at no time were these signs carried without that same person carrying with him and offering to consumers a handbill which has already been introduced into evidence. And that this activity occurred subsequent to August 15, 1970." At the hearing, the General Counsel amended his complaint by adding subsection (b) to paragraph VI which reads as follows: "Since on or about August 15, 1970, Respondent has picketed the Oak Hills project with a sign reading as follows: 'I am a cement mason handbiller, please take my handbill.'" Although it does not appear in the transcript, General Counsel in his brief "invite[s]" the Trial Examiner to take administrative notice of a temporary injunction issued on July 29, 1970 in Civil No. C-70-1518 GSL, by the United States District Court for the Northern District of California against the Respondent. It would appear General Counsel alleges that the handbilling commenced on May 2 (Paragraph VI(a) of the complaint) and continued until enjoined on July 29 when Respondent "picketed," beginning on August 15, with a sign reading: "I am a cement mason union handbiller. Please take my handbill." (General Counsel's Exhibit 2.) In any event, these dates have no effect on the substantive aspects of this proceeding.

subcontractors for recognition, nor was any effort made to organize the construction employees working at Shuler's Oak Hills housing project. In this regard, however, the General Counsel contends, *inter alia*, that the carrying of these signs by the pickets was a form of communication to Whitney, the subcontractors and their employees.

Howard H. Whitney, general contractor for the Oak Hills real estate single-dwelling project, owned by Ted Shuler, testified that these homes first went on sale in June or July of 1967. Shuler also has constructed other projects where he has not employed Whitney as a general contractor. Whitney employs approximately twelve men on the Oak Hills project, all of whom belong to the Peninsula Craftsmen and Workers Union with whom Whitney has a collective-bargaining agreement covering the wages, hours and conditions of employment of those employees. Whitney has subcontracted certain portions of the work on the project to seven employers, all of whom are named in the complaint.[6] The craftsmen on the project represented by Whitney's twelve employees are carpenters, laborers, cement finishers, brickmasons, hod carriers and operating engineers.

Whitney has no financial interest in Shuler Investments. He has a contract with Shuler whereby he works for Shuler under a "cost-plus" arrangement which Whitney described as being "a contractor's price plus a contractor's fee." He does not receive

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[6]See footnote 2.

any percentage of the profits Shuler makes on the sale of houses and all losses, if any, are borne by Shuler. Whitney has exclusive control over labor relations, hiring his employees, and selecting the subcontractors, including what he pays his employees and the subcontractors. On cross-examination, Whitney testified that he arranges for the purchase of all building materials and when suppliers and materials men submit their bills to him, they are first approved by him and then forwarded to Shuler for payment. The only thing Whitney supplies is the labor. It is found that Whitney and Shuler are independent and separate persons, each entitled to the protection of Section 8(b)(4)(ii)(B).

Whitney's employees work 40 hours a week, receive time and a half for overtime and doubletime for holidays. He pays his journeymen cement masons $6.50 an hour and his two cement foremen $7.00 and $7.20 respectively and they receive, in addition, an annual vacation bonus of $500.00. Whitney's collective bargaining agreement with the Peninsula Craftsmen and Workers Union provides that his journeymen and foremen shall receive certain health and welfare benefits which amount to an additional 33 cents an hour which represents his contribution to the union fund. There is no provision for pensions, vacation pay or holidays.

When Whitney was asked if he had any pressure exerted on him to cease doing business with Shuler, he answered: "I feel that with the use of a picket out there and the houses don't sell, then I would say that

the picket would be directed at me, because Mr. Shuler undoubtedly is not going to keep me on as his general contractor."

Phillip G. Nelson, Business Representative of the Respondent, testified that the cement mason members of his Union who have journeymen status receive a basic hourly wage of $5.62, and health and welfare benefits which amount to an additional 36 cents per hour and also pension payments which break down to an additional 75 cents an hour or a total of $6.73. They work an eight-hour day with double pay for work performed before 8 a.m. and time-and-a-half for overtime up to two hours after which they receive doubletime. Foremen receive 50 cents an hour above the highest paid journeymen on the job. Cement masons working on scaffolds receive an hourly premium of 25 cents over the scale, as do those working with "onerous materials" such as magnesite, magnesium, etc.

When Nelson was asked on cross-examination if the pay received by Whitney's cement masons was, as stated in the Union's leaflets, "below standards established" in the area by the Respondent Union, he equivocated and argued with the General Counsel's representative contending that Whitney was paying his cement masons substandard wages. When he was asked if he determined this on an independent investigation of his own or from inquiring of Whitney what he paid his cement masons, he tacitly acknowledged he had not investigated or spoken to Whitney.

When pressed, he resorted to purposeful obscurity, and taking refuge in the ambiguous statement that, "It is common knowledge," and he "heard this from a number of people in the union hall, also." Finally, after much evasion, Nelson testified: "I did not contact Mr. Whitney personally. I did not contact the union personally. But it is common knowledge . . . the wages." When Nelson was asked if he would have picketed the Oak Hills project even if Whitney was paying his cement masons more than the Respondent Union's members received, his unresponsive answer reads: "Put a picket or not on the job, and I—at this time, I couldn't make a determination like that. You're asking me a question that I can't really answer because we don't go out and just throw up picket lines." He concluded this phase of his testimony by stating that in addition to substandard wages, another reason he decided to picket the project was because, "We didn't believe that the work is up to our, what we put out here as journeymen cement masons."

At one point in his testimony, Nelson stated that Whitney's cement masons' hours of work are substandard to those of Respondent Union and at another point, he appeared to contradict himself when he testified that he never said he believed the hours Whitney's employees work are substandard. He also complained that the working conditions of Whitney's cement masons were substandard to that of Respondent Union because the Union representing Whitney's employees did not have an apprenticeship plan.

Nelson concluded his testimony by stating that his purpose in picketing the Shuler housing development was "To bring up the standards. To me, it's immaterial as to what union it is as long as the standards are up. That's about it."

Discussion

Section 8(b)(4)(ii)(B) of the Act makes it an unfair labor practice for a union:

> to threaten, coerce, or restrain any person . . .
> Where an object thereof is:
>
> > forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . .

A proviso to Section 8(b)(4) adds:

> That for the purpose of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

The Supreme Court, in *N.L.R.B. v. Servette, Inc.*,[7] and *N.L.R.B. v. Fruit and Vegetable Packers, Local 760*,[8] laid down the principles for applying these provisions. In *Fruit and Vegetable Packers* (also referred to herein as *"Tree Fruits"*), the union, in furtherance of a dispute with some fruit packers, picketed retail stores with signs requesting the consuming public not to purchase apples obtained from those packers. The Board, finding that the picketing tended to threaten or restrain the neutral stores, for an object of forcing them to cease doing business with the disfavored packers, held that the picketing violated Section 8(b)(4)(ii)(B) of the Act. The Supreme Court set aside the Board's order.

The Court, being of the view that a ban on all peaceful consumer picketing at secondary sites would raise a serious constitutional question, examined the legislative history of the 1959 amendment to Section 8(b)(4) with great care and concluded that it merely reflected a congressional intention to proscribe such picketing where it was designed "to persuade the customers of the secondary employer to cease trading with him," and not where it was "directed only at the struck product."[9]

The court added:

> When consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the pri-

[7] *N.L.R.B. v. Servette, Inc.*, 377 U.S. 46.

[8] *N.L.R.B. v. Fruit and Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58.

[9] *Id* at 63.

> mary dispute. The site of the appeal is expanded to include the premises of the secondary employer, but if the appeal succeeds, the secondary employer's purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product. On the other hand, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally. In such case, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer.[10]

Nor, in the Court's view, was a congressional intention to proscribe all consumer picketing at secondary sites shown by the circumstance that the proviso to Section 8 (b)(4) privileged "publicity, other than picketing," but made no allowance for picketing confined to the product in dispute. The Court stated:[11]

> The proviso indicates no more than that the Senate conferees' constitutional doubts led Congress to authorize publicity other than picketing which persuades the customers of a secondary employer to stop all trading with him, but not such publicity which has the effect of cutting off his deliveries or inducing his employees to cease work. On the other hand, picketing which persuades the customers of a secondary employer to stop all trading with him was also to be barred.

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[10] *Id* at 72.

[11] *Id* at 70-71.

In *Servette, supra,* the union, in furtherance of its dispute with a wholesale distributor of specialty merchandise, requested the managers of certain food chains to discontinue handling goods supplied by Servette. The managers were warned that handbills asking the public not to buy the items distributed by Servette would be passed out in front of stores which refused to cooperate, and in some cases handbills were in fact passed out. The Supreme Court, reversing the decision of the Court of Appeals for the Ninth Circuit,[12] sustained the Board's dismissal of the unfair labor practice complaint. The Court held that the requests to the store managers were not barred by subparagraph (i) of Section 8(b)(4), for that provision merely interdicted the inducement of employees to withhold employment services and not the inducement of managerial personnel to make a management decision.[13]

The Court further held that the handbilling, and the threats to handbill, did not constitute threats, coercion, or restraint barred by subparagraph (ii) of Section 8(b)(4), for such activity was protected by the publicity proviso. Rejecting the Ninth Circuit Appellate Court's view that the proviso was inapplicable because the union's dispute was with a wholesaler and not the manufacturer, the Supreme Court stated:[14]

> The proviso was the outgrowth of a profound Senate concern that the unions' freedom to ap-

[12] 310 F. 2d at 659.
[13] 377 U.S. at 49-54.
[14] 377 U.S. at 55.

> peal to the public for support of their case be adequately safeguarded. * * * It would fall far short of achieving the basic purpose if the proviso applied only in situations where the union's labor dispute is with the manufacturer or processor. * * * There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception, and we see no basis for attributing such an incongruous purpose to Congress.

In sum, the Supreme Court decisions in *Fruit and Vegetable Packers* and *Servette* hold that Congress moved with extreme caution and drew careful lines in interdicting union appeals to the consuming public to aid it in its dispute with a primary employer. That is, even though such appeals occur at a secondary site and thus may tend, in a very real sense, to exert economic pressure on neutral employers to cease doing business with the primary employer, not all such appeals fall within the ban of Section 8(b)(4)(ii)(B). First, a distinction must be drawn between appeals to consumers which merely call for a boycott of the primary employer's goods, and those which call for a more widespread boycott. The former type of boycott appeals, whether made by picketing or by other means, does not constitute a threat, coercion, or restraint within the meaning of subparagraph (ii) of Section 8(b)(4). Second, with respect to consumer boycott appeals which are not limited to the primary employer's goods, a distinction must be drawn between appeals made by other means, such as oral requests

and handbilling. Such "broad" appeals constitute a threat, coercion or restraint within the meaning of subparagraph (ii) of Section 8(b)(4) and, if made by picketing, the picketing would be unlawful (assuming the secondary object proscribed in (B) is found); however, if "publicity" other than picketing be used, the activity is saved from the ban of Section 8(b)(4)(ii)(B) by the publicity proviso to that Section (absent an interference with deliveries).

A recent Board decision involving consumer picketing is *American Bread Company,* 170 NLRB No. 19, where the Board held the union whose truck delivery members were picketing three restaurants in an effort to conduct consumer picketing aimed at the struck product—bread—to be unlawful. The Board reasoned that the product was so intertwined with the restaurants' entire business that the appeal to the public was to cease doing business with the secondary employer generally. The union contended that its action constituted consumer picketing, as the bread, like any other foodstuff purchased by a restaurant, lost its identity when served to customers. The Board held, however, that the picketing in reality was an effort by the union to force restaurants to cease buying the employer's bread. Inasmuch as the restaurants did not retail the bread but served it to their customers as part of a meal for consumption on the premises, the customer is hardly in a position, stated the Board, to choose the bread he will consume, as a customer in a retail store is able to do. The Board reasoned that, "The customer in a restaurant either takes the meal

as offered, or goes elsewhere for a meal. Thus, it appears, the bread, like any other foodstuff purchased by a restaurant, loses its identity when served and becomes a part of the restaurant's product which is offered to its customers." In effect, the picketing, found the Board, was a violation of 8(b)(4)(ii)(B) because the picketing in reality was an effort by the union to induce customers not to eat in these restaurants in order to force the restaurants to cease buying the employer's bread.

The Court of Appeals affirmed the Board, holding that since the bread is integrated into most of the food served in the restaurants, in reality the union is asking the public to boycott these neutral restaurants, which is an illegal secondary boycott.[15]

In *N.L.R.B. v. Twin City Carpenters District Council*, 422 F. 2d 309 (C.A. 8), the Court found that a union violated Section 8(b)(4)(ii)(B) of the Act by picketing a general housing contractor who purchased cabinets from a manufacturer whose employees were represented by a union to which the picketing union objected. The Court held that the picketing constituted an appeal to prospective customers to boycott the contractor's houses generally as a means of coercing the general contractor to cease doing business by not buying the manufacturer's cabinets, which was an illegal boycott. The Court rejected the union's contention that the picketing was "inept and desultory," stating:

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[15] *American Bread Company v. N.L.R.B.*, 411 F. 2d 147, 154 (C.A. 6).

> We think it immaterial that the Union neglected or declined to engage in more consistent picketing activity at all of [general contractor's] construction sites. An appeal of the kind made by the Union requesting that customers, whether few or many, generally boycott [general contractor] falls within the statutory ban.[16]

The Board had found in the *Twin City* case that the union's picketing of the general contractor constituted an unlawful appeal to prospective customers to boycott the general contractor's houses generally as a means of coercing the general contractor to cease doing business with its cabinet supplier.[17] The Board concluded that the union's conduct violated Section 8(b)(4)(ii)(B) of the Act by picketing the contractor's housing projects, despite the union's contention that the purpose of the picketing was informational, because the picketing constituted an appeal to prospective customers to boycott the contractor's houses with an object of forcing the contractor to cease buying cabinets from a supplier whose employees were represented by another union. The union's appeal to the public at the secondary site not to trade *at all* with the secondary employer, held the Board, goes beyond goods of the primary employer and seeks the public's assistance in forcing the secondary employer to cooperate with the union in its primary dispute. This, found the Board, was illegal

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[16] *N.L.R.B. v. Twin City Carpenters District Council*, 422 F. 2d 315.

[17] *Twin City Carpenters District Council, et al.*, 167 NLRB 1017, n. 1.

as it constituted an appeal to prospective customers to boycott the contractor's houses generally as a means of coercing him not to buy from the cabinet manufacturer.

To the same effect is the District of Columbia Court of Appeals opinion in *Honolulu Typographical Union*,[18] affirming 167 NLRB 1030,[19] and citing with approval the Board's decision in *American Bread Company, supra*. The Circuit Court of Appeals sustained a Board finding that respondent union therein violated Section 8(b)(4)(ii)(B) of the Act by distributing handbills and picketing several neutral establishments in an attempt to induce customers to cease purchasing the products sold at those establishments which were advertised in a newspaper with which respondent union had a primary dispute. The Court held that so long as the union's picketing merely urges consumers to cease purchasing the primary product, it is not proscribed, but when it urges them to cease their patronage of the secondary employer *in toto*, and the product is one that permeates the entire business of the secondary seller, then it becomes an unlawful boycott. The Court distinguished the *Tree Fruits* case, stating:[20]

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[18] *Honolulu Typographical Union, No. 37, et al., v. N.L.R.B.*, 401 F. 2d 952.

[19] *Honolulu Typographical Union, No. 37, AFL-CIO*, et al., 167 NLRB 1030. The Board held that the picketing of four restaurants located in a shopping center, in an attempt to induce customers to cease patronizing them, was a violation as the restaurants advertised not their products but their *entire* business. Member Jenkins dissenting held, *inter alia*, that unions should be permitted to follow all products advertised in a newspaper.

[20] *Honolulu Typographical Union, No. 37, et al. v. N.L.R.B.*, 401 F. 2d 952 at 955.

> The Board . . . has interpreted *Tree Fruits* to be inapplicable where the struck "product" has become an integral part of the retailer's entire offering, so that the product boycott will of necessity encompass the entire business of the secondary employer.

The *Honolulu* case is analogous to the proceedings at bar in that the Respondent Union's picketing appeals to prospective customers of Shuler to boycott Shuler's house, a product which "permeates" his entire business generally, as a means of coercing Shuler to cease doing business with Whitney.[21]

In *Cascade Employers Association, Inc.*, 163 NLRB 33, enforced *per curiam*,[22] the Board held that consumer picketing of completed buildings with placards proclaiming that the buildings had been built under substandard conditions by a nonunion contractor was violative of Section 8(b)(4)(ii)(B) of the Act. The Board found that even if the picketing were regarded as an appeal for a consumer boycott of the buildings as being a "product" of the primary employer, it encompassed the entire business of the neutral secondary employers. Thus, it held, an object of the picketing was to force and require the building owners to refrain from using the nonunion contractor for any future construction and to serve notice on others of retaliatory consequences of doing business with the nonunion contractor. The Board stated, at page 36:

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[21] See footnote 33, page 14.

[22] *N.L.R.B. v. Salem Building Trades Council*, 388 F. 2d 987 (C.A. 9).

> The picketing here cannot be said to have had any reasonably direct thrust against the primary employer. * * * Even assuming, *arguendo,* that identification of the building as the subject of the dispute created an appeal for a consumer boycott of the so-called "product" of the primary employer, such a product boycott would of necessity encompass the entire business of the neutral occupant's premises and, therefore, the entire business of the secondary employer, and must be said to be "employed to persuade customers not to trade at all with the secondary employer" and "designed to inflict injury on his business generally." [Citing *N.L.R.B. v. Fruit & Vegetable Packers (Tree Fruits),* 377 U.S. 58 at 72.]
>
> Inasmuch as the instant picketing was not sufficiently identified with, or limited to, the operations of the primary employer to constitute primary activity, but was designed to inflict injury on the secondary employers' businesses generally, for an object of forcing or requiring neutral employers to . . . cease using the services or doing business with the primary employer, we find that Respondent did threaten, restrain, and coerce the neutral employers within the meaning of Section 8(b)(4)(ii)(B) of the Act. [Citing *Alton-Wood River Building and Construction Trades, et al.,* 154 NLRB 982.]

Conclusions

Section 8(b)(4)(ii)(B) sets forth a narrow proscription against a specific means—secondary picketing—designed to achieve a clearly defined unlawful object, that of forcing or requiring neutral employers to cease doing business with any other person. "The

impact of the Section [is] directed toward what is known as the secondary boycott whose 'sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it.'"[25] The Congressional objective in enacting Section 8(b)(4) was to shield "unoffending employers and others from pressures in controversies not their own,"[26] and to "reduce the impact of labor disputes by expanding the protection afforded by this Section."[27]

Although no employees refused to work because of the pickets and their distribution of leaflets at the entrance to the Oak Hills project, it is found, nevertheless, that these activities by the Respondent Union members constituted a restraint upon those seeking to view the homes offered for sale by Shuler. Those who came to examine the homes, it is apparent, were potential buyers of these homes. Under such circumstances, the conduct described above, for the reasons hereinafter explicated, neither constitutes publicity "for the purpose of truthfully advising the public . . ." within the purview of the proviso to Section 8(b)(4), nor did Congress, as evidenced by the legislative history, intend to encompass such conduct within the immunizing proviso.

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[25] *International Brotherhood of Electrical Workers v. N.L.R.B.*, 131 F. 2d 34 at 37, citing *Local 761, International Union of Electrical Workers v. N.L.R.B.*, 366 U.S. 667 at 672.

[26] *N.L.R.B. v. Denver Building Council*, 341 U.S. 675.

[27] *Los Angeles Newspaper Guild, Local 69 (Hearst Corp.)*, 135 NLRB No. 25.

Moreover, it is questionable that Respondent's assertion in its handbills that "The General Contractor constructed these homes using persons to perform Cement Masons' work below standards established by Cement Masons' Unions in this area," is a truthful representation. Based upon the testimony of Nelson, the Union's business representative, and Whitney, the general contractor, it appears that the handbills were not only misleading but untrue when it stated therein that Whitney's cement masons were paid wages "below standards established by Cement Masons' Unions in this area."[28] Under the Board's *State Mart* decision, 166 NLRB at 818, only wages and fringe benefits may lawfully be the thrust of area standards picketing. In comparing Whitney's employees' pay with that of members of the Respondent Union, it is found that Whitney pays $6.83 an hour while Respondent's members receive approximately $6.73 an hour. Accordingly, this misinformation cannot be considered within the purview and protection of the publicity proviso of Section 8(b)(4), particularly so when it is considered that Nelson made no personal effort to ascertain if his accusation that Whitney paid substandard wages were true. It is not too unreasonable an inference to conclude from Nelson's willful neglect to ascertain the truth that these inaccurate handbills were issued with knowledge of, or reckless disregard for, the truth.[29] It is found, therefore, that

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[28] *Cf. New York Times Co. v. Sullivan*, 376 U.S. 254.

[29] *Honolulu Typographical Union, No. 37, AFL-CIO, supra*, 167 NLRB 1030 at 1032.

the Respondent Union's handbilling was not privileged under the "publicity" proviso of Section 8(b)(4).

Furthermore, there was a direct appeal made to customers, "not [to] purchase these homes," so that there was a direct economic threat to Shuler, a neutral, with the objective of causing him not to do business with Whitney.[30] Also, the Respondent engaged in picketing and handbilling for an objective proscribed by the Act, with the purpose and impact to threaten, coerce or restrain within the purview of Section 8(b)(4)(ii)(B) as hereinafter explicated, not only Shuler, who had no dispute with the Union, but also the subcontractors, with the object of forcing all of them, including Shuler, to cease doing business with Whitney.

Thus, in *Tree Fruits, supra,* the Court stated:[31]

> . . . that [the legislative history of the amendments to Section 8(b)(4)] does not reflect with the requisite clarity a Congressional plan to proscribe all peaceful consumer picketing at secondary sites, and particularly, any concern with peaceful picketing when it is limited, as here, to persuading Safeway customers not to buy Washington State apples when they traded in the Safeway stores. All that the legislative history shows in the way of an "isolated evil" believed to require proscription of peaceful consumer picketing at secondary sites, was its use to persuade customers of the secondary employer to

[30]See pages 9-10 of the text.

[31]*N.L.R.B. v. Fruit and Vegetable Packers, supra,* 377 U.S. 58 at 63.

> cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer. This narrow focus reflects the difference between such conduct, and peaceful picketing at the secondary site directed only at the struck product. In the latter case, the union's appeal to the public is confined to its dispute with the primary employer, since the public is not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's goods. On the other hand, a union appeal to the public at the secondary site not to trade at all with the secondary employer goes beyond the goods of the primary employer, and seeks the public's assistance in forcing the secondary employer to cooperate with the union in its primary dispute.

Thus, the teaching of Board and Court decisions is that a violation of the Act occurs when a struck product is so merged with other products that the only way for a customer to boycott the struck product is to cease patronizing the picketed place of business. Accordingly, it is found that Respondent's picketing at Shuler's houses was intended to cause potential buyers to cease entirely their patronage of Shuler, the secondary employer. Therefore, the Respondent's picketing appeal to consumers not to purchase Shuler's homes is, realistically, the traditional "do not patronize" this housing project. This conclusion accords with the Board's interpretation of the Supreme Court's *Tree Fruits* decision, supra, holding it to be inapplicable where the struck "product" has become an integral part of the seller's *entire* offering, so that

the product boycott will of necessity encompass the entire business of the secondary employer.[32]

Then too, there must be borne in mind the distinction between a limited and a total boycott: When the picketing appeal to consumers is expanded to request a total boycott of the secondary seller, this is an unfair labor practice as here, there exists a type of pressure that spreads to and disrupts his entire business. Likewise, in the instant situation, the picketing by Respondent at the Oak Hills project urged potential buyers not to buy the "struck product"—in this case, the homes constructed by Whitney and his subcontractors for Shuler, the neutral, or secondary seller. This concept must be considered in the context of the "struck product" having been so merged into Shuler's business, which is the sale of one product only, namely, houses, so that an appeal to the consumer or buyer not to purchase Shuler's homes is tantamount to urging a boycott of his entire business. Thus, the picketing and handbilling by Respondent resulted, in its legal incidence, in a total boycott of Shuler's business, a violation of Section 8(b)(4)(ii)(B) of the Act.[33]

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[32]Accord: *American Bread Company*, 170 NLRB No. 19.

[33]In *Tree Fruits*, the Supreme Court reasoned that while Section 8(b)(4)(ii)(B) outlaws picketing of all products handled by a secondary employer, Congress had not, with "requisite clarity," evidenced an intention to prohibit consumer picketing aimed only at the product of the primary employer with which the employer has a dispute. It would seem this distinction disappears where, as here, Shuler is a single product (homes) seller and the picketing is directed against that product. The two situations presumed by the Court, it would appear, merge into one, resulting in the picketing of the product becoming indistinguishable from a total boycott of the secondary employer.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, as set forth in Section III above, occurring in connection with the operations of the primary employer and of the secondary employers described in Section I and Section III above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent Union has violated Section 8(b)(4)(ii)(B) of the Act as set forth above, it shall be recommended that it cease and desist from such conduct and take certain affirmative action designed to effectuate the policies of the Act.

Upon the foregoing findings of fact and the record in the case, there are hereby made the following:

Conclusions of Law

By the conduct of its pickets (in attempting to persuade the public not to patronize Shuler) and its handbilling, Respondent engaged in a campaign designed to threaten, coerce and restrain customers of Shuler with an object of forcing or requiring Shuler to cease doing business with Whitney, in violation of Section 8(b)(4)(ii)(B) and Section 2(6) and (7) of the Act.[34]

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[34]The Board, in *Local 825, International Union of Operating Engineers, AFL-CIO, et al.*, 162 NLRB 1617, reversed the Trial Examiner's finding that a "disruption of business" is not sufficient

RECOMMENDATIONS

Accordingly, upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record herein and pursuant to Section 10(c) of the Act, as amended, it is hereby recommended issuance of the following:

ORDER[35]

Respondent's Cement Masons Union Local 337, Operative Plasterers' and Cement Masons' International Association of the United States and Canada, AFL-CIO, their officers, representatives, successors, agents and assigns, shall:

1. Cease and desist from threatening, coercing and restraining Ted Shuler, doing business as Shuler Investments, by engaging in picketing and handbilling to persuade customers not to patronize or purchase homes sold by Shuler Investments, or threatening to engage in such picketing where an object thereof is to force or require Shuler Investments, or any other persons, to cease doing business with Howard H.

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to establish a union's effort to compel one employer to "cease doing business" with the other. The Court of Appeals, 410 F. 2d 5 (C.A. 3), 71 LRRM 2079, held, like the Trial Examiner, that it is necessary to establish that the union's object is to bring about a total cessation of business between the neutral and primary employer in order to prove a violation of Section 8(b)(4)(ii)(B). Certiorari was granted by the Supreme Court on February 24, 1970 (397 U.S. 905).

[35]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the finding, conclusions, recommendations and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its finding, conclusions and order, and all objections thereto shall be deemed waived for all purposes.

Whitney, under circumstances prohibited by Section 8(b)(4)(ii)(B) of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post in conspicuous places at its business offices and meeting halls, including all places where notices to members are customarily posted, copies of the attached notice marked "Appendix."[36]

(b) Furnish to the Regional Director for Region 20 signed copies of the attached notice marked "Appendix," for posting by Shuler Investments and Howard H. Whitney, if they are willing, at places where they customarily post notices to their employees.

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of the receipt of this decision, what steps the Respondent has taken to comply herewith.[37]

(d) It is further recommended that, unless within 20 days from the date of receipt of this Decision, the Respondent notify the said Regional Director, in writing, that it will comply with the foregoing recommendations, the National Labor Relations Board issue

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[36]In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading, "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read, "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[37]In the event that this Recommended Order is adopted by the Board, after exceptions have been filed, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order what steps the Respondent has taken to comply herewith.

an order requiring the Respondent to take the aforesaid action.

Dated:

/s/ Henry S. Sahm
Henry S. Sahm
Trial Examiner

Appendix

NOTICE TO ALL OFFICERS, AGENTS AND MEMBERS OF

Cement Masons' Union, Local 337
Operative Plasterers' and Cement
Masons' International Association
of the United States and Canada,
AFL-CIO.

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

Pursuant to the Recommended Order of a Trial Examiner and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT, in any manner prohibited by Section 8(b)(4)(ii)(B) of the National Labor Relations Act, threaten, coerce, or restrain Shuler Investments where an object thereof is either to persuade customers not to patronize Shuler, or to force or require

Shuler Investments to cease doing business with Howard H. Whitney.

Cement Masons' Union, Local 337
Operative Plasterers' and Cement
Masons' International Association
of the United States and Canada,
AFL-CIO.
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This Is an Official Notice and Must Not Be Defaced by Anyone

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, 13050 Federal Building, 450 Golden Gate Avenue, Box 36047, San Francisco, California 94102. Telephone: 556-0335.

190 NLRB No. 46

D—4977
Monterey, Calif.

United States of America
Before the National Labor Relations Board

Case 20—CC—1014

Cement Masons Union Local 337, Operative Plasterers' and Cement Masons' International Association of the United States and Canada, AFL-CIO

and

California Association of Employers

DECISION AND ORDER

On December 8, 1970, Trial Examiner Henry S. Sahm issued his Decision in this case, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed limited exceptions and accompanying briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no

prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that the Respondent Cement Masons Union Local 337, Operative Plasterers' and Cement Masons' International Association of the United States and Canada, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's recommended Order.[2]

Dated, Washington, D.C., May 4, 1971.

Edward B. Miller, Chairman

John H. Fanning, Member

Gerald A. Brown, Member

(Seal) National Labor Relations Board

[1]As we are satisfied that the handbilling in this case was inextricably linked with the unlawful picketing, we find it unnecessary to pass on whether the handbilling would independently violate the Act if conducted under circumstances disassociated from other proscribed activity.

[2]In fn. 37 of the Trial Examiner's Decision substitute "20" for "10" days.

192 NLRB No. 52

D—5378
Monterey, Calif.

United States of America
Before the National Labor Relations Board

Case 20—CC—1014

Cement Masons Union Local 337, Operative Plasterers' and Cement Masons' International Association of the United States and Canada, AFL-CIO
and
California Association of Employers

SUPPLEMENTAL DECISION

On May 4, 1971, the National Labor Relations Board issued its Decision and Order in the above case,[1] finding, *inter alia,* that the Respondent had engaged in picketing with signs and handbills in violation of Section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended, and ordering it to cease and desist therefrom and take certain affirmative action. Thereafter the General Counsel filed a motion for reconsideration, which was duly served on the parties, and which requested the Board to (1) make appropriate findings with regard to the "TO CON-

[1] 190 NLRB No. 46.

SUMERS ONLY . . ." picketing which began on May 2, 1970; (2) make appropriate findings as to the remaining secondary employers alleged in the complaint; and (3) make any additional appropriate findings necessary to correct the sequence of events, including correcting the date on which the Trial Examiner found that handbilling began.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board, having duly considered the matter, has decided to grant, in part, and deny, in part, the General Counsel's motion.

The complaint in this case was based on an allegedly unlawful product boycott imposed by Respondent in furtherance of a primary labor dispute with Howard W. Whitney, the general contractor on a residential housing development. Thus, commencing on May 2, 1970,[2] Respondent picketed the development on weekends when no employees of Whitney or subcontractors were present, with signs stating:

TO CONSUMERS ONLY
Cement Masons Work Done By
General Contractor Below
Standard Established by Cement
Masons Local 337, Monterey County
PLEASE DO NOT PURCHASE
THESE HOMES

[2]All dates refer to 1970.

This picketing terminated on July 29 and, on August 15, was followed by the picketing and handbilling which furnished the specific basis for our original conclusion, which we hereby reaffirm, that Respondent violated Section 8(b)(4)(ii)(B) of the Act. However, in our initial Decision and Order, no specific finding was made with respect to the picketing which occurred between May 2 and July 29. Upon reconsideration, we find merit in the General Counsel's request that findings be made with respect to this phase of Respondent's conduct since the issues arising therefrom were alleged and fully litigated.

As in the case of the picketing and handbilling which began on August 15, the May 2 picket sign, urging a consumer boycott against Schuler Investments, the owner of the homes and a neutral person, imposed direct coercive pressure on Schuler to force him to cease doing business with Whitney, the primary employer. Furthermore, and for the reasons set forth by the Trial Examiner in finding the August 15 picketing and handbilling unlawful, the May 2 conduct was neither privileged consumer picketing within the *Tree Fruits* doctrine[3] nor protected as ". . . publicity, other than picketing . . ." within the proviso to Section 8(b)(4).[4] Accordingly, we find that the May 2 picketing violated Section 8(b)(4)(ii)(B).[5]

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[3]*N.L.R.B. v. Fruit and Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58.

[4]Cf. *N.L.R.B. v. Servette, Inc.*, 377 U.S. 46.

[5]The remedy provided in our initial Decision and Order is not affected by this additional finding and need not be modified.

Finally, we find no merit in the General Counsel's request that certain named subcontractors of Whitney be included in our remedial order as neutral employers. In our opinion, these subcontractors doing business with the primary employer were not shown to have been the object of any direct pressures to force them to cease doing business with Whitney, and the unlawful product boycott directed at Schuler was too remote to constitute 8(b)(4)(ii) restraint and coercion against these subcontractors.

Accordingly, the General Counsel's motion is hereby granted insofar as it requests the Board to make additional and clarifying findings with respect to the picketing which occurred between May 2, 1970, and July 29, 1970, but in all other respects is hereby denied.

Dated, Washington, D.C.,
July 30, 1971.

Edward B. Miller, Chairman

John H. Fanning, Member

Gerald A. Brown, Member

(Seal) National Labor Relations Board

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United States District Court
for the Northern District of California

Civil No. C-70 1518 GSL

Roy O. Hoffman, Regional Director of the Twentieth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,
Petitioner,

vs.

Cement Masons Union Local 337, Operative Plasterers' and Cement Masons' International Association of the United States and Canada, AFL-CIO,
Respondent.

TEMPORARY INJUNCTION

[Filed July 29, 1970]

This cause is before the Court upon the verified petition of Roy O. Hoffman, Regional Director of the Twentieth Region of the National Labor Relations Board, for and on behalf of said Board, for a tem-

porary injunction pursuant to Section 10(l) of the National Labor Relations Act, as amended (29 U.S.C., §160(l), herein called the Act), pending the final disposition of the matters herein involved now pending before said Board, and upon the issuance of an order to show cause why injunctive relief should not be granted as prayed in said petition. Respondent filed an answer to said petition. The Court, upon consideration of the pleadings, supporting affidavits, evidence, briefs and arguments of counsel, and the entire record in the case, has made and filed its Findings of Fact and Conclusions of Law, finding and concluding that there is reasonable cause to believe that Respondent has engaged in and is engaging in, acts and conduct in violation of Section 8(b)(4)(ii) subparagraph (B), of the Act, and that such acts and conduct will likely be repeated or continued unless enjoined.

Accordingly, upon the entire record, it is

Ordered, Adjudged and Decreed that, pending the final disposition of the matters herein involved pending before the National Labor Relations Board, Respondent Cement Masons Union Local 337, Operative Plasterers' and Cement Masons' International Association of the United States and Canada, AFL-CIO, its officers, representatives, agents, servants, employees, attorneys, and all members, persons and other labor organizations acting in concert or participation with it, be, and they hereby are, enjoined and restrained from:

(a) Picketing at or in the immediate vicinity of any of the group of single dwelling tract homes

known as Oak Hills, located near Castroville, California, or in any other manner, threatening, coercing, or restraining Shuler Investments, Surf Tile Co., Marina Plumbing & Hardware Company, Inc., A & A Electric, Marina Carpet, Lovell Austin Sheet Rock, Dooley-Bruno Stucco, Ross Roofing, and/or Coast Carpet, herein called Shuler, Surf, Marina Plumbing, A & A, Marina Carpet, Lovell, Dooley-Bruno, Ross and Coast Carpet, respectively, their suppliers, or cerriers for their suppliers, or any other person engaged in commerce or in an industry affecting commerce,—

where an object thereof is: (1) to force or require Shuler, Surf, Marina Plumbing, A & A, Marina Carpet, Lovell, Dooley-Bruno, Ross, Coast Carpet, or any other person, to cease doing business with Howard H. Whitney, d/b/a Howard H. Whitney, General Contractor, herein called Whitney, or (2) to force or require any motor carrier, supplier or other person with whom Shuler, Surf, Marina Plumbing, A & A, Marina Carpet, Lovell, Dooley-Bruno, Ross or Coast Carpet regularly or customarily does business, and/or the purchasers of the said employers' respective products, or of the homes or buildings of which their products are a part, to cease doing business with the said employers so as to force them to cease doing business with Whitney.

Done at San Francisco, California, this 29th day of July, 1970.

Gerald S. Levin
United States District Judge

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United States District Court
for the Northern District of California

Civil No. C-70 1518 GSL

Roy O. Hoffman, Regional Director of the Twentieth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,
Petitioner,

vs.

Cement Masons Union Local 337, Operative Plasterers' and Cement Masons' International Association of the United States and Canada, AFL-CIO,
Respondent.

[Filed Nov. 5, 1970]

ADJUDICATION AND ORDER IN CIVIL CONTEMPT

Roy O. Hoffman, Regional Director of the Twentieth Region of the National Labor Relations Board, having duly petitioned this Court for an order ad-

judging Cement Masons Union Local 337, Operative Plasterers' and Cement Masons' International Association of the United States and Canada, AFL-CIO, its president, Billy J. Gardner, its business agent, Phillip Nelson, and its picket(s), unidentified individuals, respectively called Respondents Local 337, Gardner, Nelson and Picket(s), and collectively called Respondents, in civil contempt of this Court by reason of disobedience of and resistance to, and failure and refusal to comply with, the Temporary Injunction order of this Court entered herein on July 29, 1970; and this Court having, on September 25, 1970, ordered the said Respondents to appear before this Court and show cause why they should not be adjudged in civil contempt of this Court; and the matter having come on for hearing before the Court on October 19, 1970, and Respondents having appeared personally or by counsel, and having been afforded full opportunity to offer evidence and to argue on the law and the facts; and it having been determined that this Court shall make Findings of Fact and Conclusions of Law and enter such order as warranted by the evidence before the Court; now, therefore, upon all the pleadings and proceedings heretofore had herein, it is hereby

Ordered, Adjudged and Decreed that Respondent Local 337 and individual Respondents Gardner, Nelson and Picket(s) are, and have been, and they hereby are adjudged to be, in civil contempt of this Court by reason of their disobedience of and resistance to, and their failure and refusal to comply with, the Temporary Injunction order of this Court entered herein on July 29, 1970; and it is further

Ordered, Adjudged and Decreed that said Respondents Local 337, Gardner, Nelson and Picket(s), and each of them, shall purge themselves of their said civil contempt of this Court, by:

(a) Fully complying with all the provisions of this Court's order of July 29, 1970;

(b) Forthwith ceasing and desisting from picketing at or in the immediate vicinity of any of the group of single dwelling tract homes known as Oak Hills, located near Castroville, California, or in any other manner, threatening, coercing, or restraining Shuler Investments, Surf Tile Co., Marina Plumbing & Harware Company, Inc., A & A Electric, Lovell Austin Sheet Rock, Dooley-Bruno Stucco, Ross Roofing, and/or Coast Carpet, herein called Shuler, Surf, Marina Plumbing, A & A, Lovell, Dooley-Bruno, Ross and Coast Carpet, respectively, their suppliers, or carriers for their suppliers, or any other person engaged in commerce or in an industry affecting commerce,—

where an object thereof is: (1) to force or require Shuler, Surf, Marina Plumbing, A & A, Lovell, Dooley-Bruno, Ross, Coast Carpet, or any other person, to cease doing business with Howard H. Whitney, d/b/a Howard H. Whitney, General Contractor, herein called Whitney, and/or (2) to force or require any motor carrier, supplier or other person with whom Shuler, Surf, Marina Plumbing, A & A, Lovell, Dooley-Bruno, Ross, or Coast Carpet regularly or customarily does business and/or the purchasers of their respective products, or of the homes or buildings of which their products are a part, to cease doing

business with the said employers, so as to force or require them to cease doing business with Whitney;

(c) Notifying all members of Respondent Local 337, by mail, that Respondents have been adjudged in civil contempt of this Court's order of July 29, 1970, and that Respondents will not repeat the conduct found to have violated the Court's order, or engage in, sanction, support, induce or encourage acts or conduct in violation of this Court's order, as set forth in the Notice attached hereto as an Appendix;

(d) Posting Notices attached hereto as an Appendix at all places where notices and communications to members of Respondent Local 337 are usually posted, and maintaining said posted Notices for a period of at least sixty (60) consecutive days, stating that Respondents have been adjudged in civil contempt of this Court for their disobedience of and resistance to, and their failure and refusal to comply with, this Court's injunction order of July 29, 1970, and that Respondents will not repeat the conduct found to have violated the Court's order, or further engage in, sanction, support, induce or encourage acts or conduct in violation of this Court's order;

(e) Making available to Whitney, Shuler, Surf, Marina Plumbing, A & A, Lovell, Dooley-Bruno, Ross, and Coast Carpet, signed copies of said Notice for posting at their places of business, said Employers willing;

(f) Filing with the Clerk of this Court and serving copies thereof upon Petitioner, within five (5) days

after the entry of this Order of Adjudication in Civil Contempt, sworn statements showing in detail the steps taken by Respondents, and each of them, to comply with the Court's Order of Adjudication in Civil Contempt;

(g) Paying to the Board, by way of a "compensatory fine," all of Petitioner's costs and expenses, including counsel fees and any reporters' fees, incurred by the Board in the investigation, preparation, presentation, conduct and final disposition of this proceeding to adjudge Respondents in civil contempt, and, in addition, the Court costs of this proceeding as taxed by the Clerk of this Court; and

(h) Making a personal appearance before this Court within ten (10) days after entry of the order of adjudication, and upon two (2) days' notice to Petitioner, and showing to the Court that Respondents, and each of them, have brought themselves into compliance with the Temporary Injunction dated July 29, 1970, and with this Order of Adjudication in Civil Contempt. Upon such a showing, Respondents will be purged of any civil contempt; and it is further

Ordered, Adjudged and Decreed that in the event of the failure or refusal of a Respondent to comply with the purgation provisions of this decree and to make the showing referred to in paragraph (h) above, attachment for civil contempt shall issue against such Respondent and Respondent Local 337 shall pay to Petitioner a "compliance fine" of $2,500 and a further "compliance fine" of $250 a day shall be imposed on Respondent Local 337 and on each noncomplying individual Respondent for each day or part

thereof of non-compliance thereafter, and this Court will deal further with the matter by such other means as the Court shall then determine.

Dated at San Francisco, California, this 5th day of November, 1970.

/s/ Gerald S. Levin
Gerald S. Levin
United States District Judge

NOTICE

To All Members of

Cement Masons Union Local 337, Operative Plasterers' and Cement Masons' International Association of the United States and Canada, AFL-CIO

and to All Other Interested Parties

Whereas the United States District Court for the Northern District of California, in Civil Action C-70 1518 GSL, on July 29, 1970, issued its Temporary Injunction enjoining and restraining the undersigned Local 337, its officers, representatives, agents, servants, employees, attorneys, and all members, persons and other labor organizations acting in concert or participation with it, pending the final disposition of the matter involved pending before the National Labor Relations Board, from

Picketing at or in the immediate vicinity of any of the group of single dwelling tract homes known as Oak Hills, located near Castroville, California, or in any other manner, threatening, coercing, or restraining Shuler Investments, Surf

Tile Co., Marina Plumbing & Hardware Company, Inc., A & A Electric, Marina Carpet, Lovell Austin Sheet Rock, Dooley-Bruno Stucco, Ross Roofing, and/or Coast Carpet, herein called Shuler, Surf, Marina Plumbing, A & A, Marina Carpet, Lovell, Dooley-Bruno, Ross and Coast Carpet, respectively, their suppliers, or carriers for their suppliers, or any other person engaged in commerce or in an industry affecting commerce,—

where an object thereof is: (1) to force or require Shuler, Surf, Marina Plumbing, A & A, Marina Carpet, Lovell, Dooley-Bruno, Ross, Coast Carpet, or any other person, to cease doing business with Howard H. Whitney, d/b/a Howard H. Whitney, General Contractor, herein called Whitney, and/or (2) to force or require any motor carrier, supplier or other person with whom Shuler, Surf, Marina Plumbing, A & A, Marina Carpet, Lovell, Dooley-Bruno, Ross or Coast Carpet regularly or customarily does business and/or the purchasers of their respective products, or of the homes or buildings of which their products are a part, to cease doing business with the said employers, so as to force or require them to cease doing business with Whitney.

Whereas, on August 15, 1970, and thereafter on dates specified the undersigned Local 337, its officers and agents resumed picketing at the Oak Hills tract and again threatened, coerced or restrained Shuler, subcontractors of Whitney at the Oak Hills project, suppliers, motor carriers and other persons with whom said employers have been doing business, including purchasers of their respective products, or of the

homes or buildings of which their products are a part.

Whereas, the United States District Court has found that an object of the said picketing was to cause customers of the firms picketed on August 15, 1970, and thereafter to cease doing business with the said firms, and to force them to cease doing business with Whitney.

Whereas, by reason of the picketing aforesaid, the United States District Court on November 15, 1970, issued its Adjudication and Order in Civil Contempt, adjudging the undersigned Local 337, its officers and agents, in civil contempt of Court for disobedience of, and resistance to, and failure and refusal to comply with, the aforesaid Temporary Injunction order entered by the Court on July 29, 1970;

Now, Therefore, the undersigned Local 337, its officers and agents, give notice that we will not repeat the conduct found to have violated the Court's order, or further engage in, sanction, support, or induce or encourage, any acts or conduct in violation of said injunction order.

Dated this day of October, 1970.

Cement Masons Union Local 337, Operative Plasterers' and Cement Masons' International Association of the United States and Canada, AFL-CIO

By .....

Billy J. Gardner, President

By .....

Phillip Nelson, Business Agent

United States Court of Appeals for the Ninth Circuit

Roy O. Hoffman, Regional Director of the Twentieth Region of the National Labor Relations Board, for and on Behalf of the National Labor Relations Board, Petitioner-Appellee, vs. Cement Masons Union Local 337, Operative Plasterers' and Cement Masons' International Association of the United States and Canada, AFL-CIO; Its President, Billy J. Gardner; Its Business Agent, Phillip Nelson; and Its Pickets, Respondents-Appellants.	No. 71-1439

On Appeal from an Order of the United States District Court for the Northern District of California

National Labor Relations Board, Petitioner, vs. Cement Masons Union Local 337, Operative Plasterers' and Cement Masons' International Association of the United States and Canada, AFL-CIO, Respondent.	No. 71-2828

On Application for Enforcement of an Order of The National Labor Relations Board

[October 26, 1972]

Before: CARTER and WALLACE, Circuit Judges, BYRNE, District Judge.*

JAMES M. CARTER, Circuit Judge:

These cases were consolidated for argument and decision because they involve common questions. In No.

*Hon. William M. Byrne, Senior District Judge, Central District of California, sitting by designation.

71-2828, the National Labor Relations Board seeks enforcement of its decision that picketing by the Cement Masons Union violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 158(b)(4)(ii)(B) (1970). In No. 71-1439, the Union appeals from a judgment of civil contempt for picketing in violation of a temporary injunction issued by the District Court on application of the Regional Director of the N.L.R.B., pursuant to Section 10(l) of the Act, 29 U.S.C. § 160(l) (1970).

The common question presented is whether through picketing, or patrolling with signs and handbills, a union may appeal to consumers not to purchase the sole product of a secondary employer, himself not involved in a dispute with the union. We grant the petition to enforce and affirm the judgment of contempt.

Facts

These actions arose from the Union's displeasure over wages and working conditions afforded nonunion employees by one Whitney, a general contractor with whom the Union had no direct dealings. Whitney, the "primary employer," built homes at Oak Hills subdivision which were owned and sold by one Shuler, the "secondary employer." Whitney and Shuler are clearly separate entities. Shuler has homes and apartments for sale at other locations, some built by Whitney, but we are here concerned only with the homes at Oak Hills, which are Shuler's sole product at that site.

In No. 71-2828, the same events gave rise to an unfair labor practice charge before the Board. A trial

examiner found the Union's conduct to be unlawful. The Board affirmed his decision on May 4, 1971, 190 N.L.R.B. No. 46, concerning the picketing which began on August 15, 1970. The same result was reached as to the earlier picketing in a supplemental decision of July 30, 1971, 190 N.L.R.B. No. 52. The Union was ordered to terminate its picketing, and take certain affirmative action.

From about May 2 to late July, 1970, the Cement Masons Union picketed the only entrance to Oak Hills subdivision with signs reading: "TO CONSUMERS ONLY. Cement Masons Work done by General Contractor below Standard Established by Cement Masons Local 337, Monterey County. PLEASE DO NOT PURCHASE THESE HOMES."

After notice and hearing, the District Court in No. 71-1439, on July 29, 1970, enjoined such picketing pending the N.L.R.B.'s final determination whether such conduct violated the Labor Management Relations Act.

From about August 15, to at least October 3, 1970, the Union stationed a man at the same location with a sign which read: "I AM A CEMENT MASON UNION HANDBILLER—PLEASE TAKE MY *HANDBILL.*" At times the word "UNION" did not appear on the sign. The Union concurrently distributed a handbill reading: "TO CONSUMERS ONLY: Please do not purchase these homes. The General Contractor constructed these homes using persons to perform Cement Masons' work below stan-

dards established by Cement Masons' Union in this area." This activity occurred only on weekends at times when Whitney's employees were not on the job. However, the Board found that it reached about 80 percent of Shuler's potential buyers.

On November 5, 1970, after notice and hearing, the District Court in No. 71-1439 held the Union in civil contempt for its actions in violation of the temporary injunction, assessing pecuniary penalties and requiring the usual notices and conforming conduct.

Enforcement of the N.L.R.B. Order

Section 8(b)(4)(ii)(B) of the Act, *supra,* 29 U.S.C. §158(b)(4)(ii)(B), in pertinent part, makes it an unfair labor practice for a union to "threaten, coerce or restrain any person" with an object of "forcing or requiring any person to cease using . . . or otherwise dealing in the products of any other producer . . . or manufacturer, or to cease doing business with any other person . . . *Provided,* [that primary picketing is not made unlawful under this section and that] nothing [in this paragraph] shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product . . . [is] produced by an employer with whom the labor organization has a primary dispute and [is] distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer [to refuse delivery or stop work]."

Thus, peaceful picketing directed solely to consumers, which asks them not to purchase specified struck products from a neutral secondary employer, is not prohibited by the Act. *N.L.R.B. v Fruit & Vegetable Packers, Local 760,* 377 U.S. 58 (1964) [hereinafter cited as *Tree Fruit*]. A union may "follow the struck product" into the secondary establishment, however, only if such secondary boycott does not attempt to influence customers to completely cease *all* transactions with the neutral employer. *Tree Fruit, supra,* at 72; *Honolulu Typographical Union No. 37 v. N.L.R.B.* (D.C. Cir. 1968) 401 F.2d 952, 957 [hereinafter cited as *Honolulu*]. *See American Bread Co. v. N.L.R.B.* (6 Cir. 1969) 411 F.2d 147, 154. The basis of the statute is congressional concern that neutral third-party employers not be involved in labor disputes not their own. *E.g., N.L.R.B. v. Local 825, International Union of Operating Engineers,* 400 U.S. 297, 302 (1971).

The present cases are factually unlike *Tree Fruit, supra.* The Supreme Court there approved picketing of retail food stores that was narrowly confined to requesting consumers not to purchase the struck product, which was one of many products sold in the stores. Instead, we have here a single product for sale by the secondary, the homes, a part of which, the masons' work, was produced under the disputed labor conditions.

Congress determined that when a union's interest in picketing a primary employer at a "one product" site, was in direct conflict with the need to protect

such neutral employers from the labor disputes of others, the neutral's interests would prevail. *See, Operating Engineers, supra,* 400 U.S. at 302-03; *Tree Fruit, supra,* 377 U.S. at 70-71; *Teamsters Union, Local 309 v. Hanke,* 339 U.S. 470, 475-78 & n.5 (1950). In the latter case, it was pointed out that a union may thus be foreclosed from unbridled "free speech," but this interest must be balanced against the infringement it causes to the rights of others. 339 U.S. at 474-75. "Peaceful consumer picketing to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer, is poles apart from such picketing which only persuades his customers not to buy the struck product." *Tree Fruit, supra,* 377 U.S. at 70. Asking the public to totally boycott a neutral, is tantamount to a demand that he cease dealing with the primary object of the Union's grievance. *Id.* at 72. It is just such activity which the Act prohibits.[1]

The Union's conduct here, in requesting that consumers not purchase Shuler's homes, could, if effec-

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[1]The Union's suggestion that its conduct is protected by *Amalgamated Food Employees v. Logan Valley Plaza,* 391 U.S. 308 (1968), is without merit. Our concern here is not with access to private property for First Amendment purposes, but with regulation of labor-management relations. This is not to say that unions are always foreclosed from informational activity. But balancing of the union's interest against the restricting state interest does not occur until the Union shows a protected interest. When their picketing, under the guise of informing the public, has the proscribed coercive effects upon a neutral employer, less coercive means of expression must be used. Picketing for unlawful ends may be restrained. *N.L.R.B. v. San Francisco Typographical Union No. 21* (9 Cir., Nos. 71-1681, 26,042, June 21, 1972). *See also, e.g., Hughes v. Superior Court,* 339 U.S. 460 (1950).

tive, result only in coercing Shuler to cease doing business with Whitney. Their contract was terminable on 24-hour notice. The Board found that such conduct was within the proscription of the statute.

From about August 15, 1970, the Union adopted a sign and handbill method of appeal rather than traditional sign-only picketing. But the mere use of a handbill does not convert its action into unsanctioned "publicity, other than picketing, for the purpose of truthfully advising the public" that the product is a subject of dispute. 29 U.S.C. § 158(b)(4)(ii)(B), *supra; Tree Fruit, supra,* 377 U.S. at 70-71. The sign simply referred to the handbill, which stated the Union's message. We have no difficulty agreeing with the Board that this was picketing. But even if it were not, the Board also found, on conflicting evidence, that the Union's false claims were made "with knowledge of, or reckless disregard for, the truth," because Whitney's wages were not in fact below union standards, a fact which the Union did not attempt to discover. The publicity exception of the statute does not apply.

The Union urges that its signs and handbills sufficiently identified Whitney as the general contractor with whom it had a dispute, so that the public could direct its action, if any, toward Whitney and not Shuler. However, consumers could reasonably have believed that Shuler, who sold the homes, was his own general contractor. There was no name mentioned. The dispositive factor is the probable effect of the

picketing upon the consumer. *N.L.R.B. v. Twin City Carpenters District Council* (8 Cir. 1970) 422 F.2d 309, 314. Moreover, there was no attempt to explain the controversy so that the public could tailor its response to only the disputed matters. There is a great difference in impact when the public is asked to be selective among products once inside the secondary's premises, *Tree Fruit, supra,* and in asking them to completely refuse to enter, or to cease all dealings with the secondary. *Honolulu, supra,* 401 F.2d at 956-57. Consumers here could reasonably expect that they were being asked not to transact any business whatsoever with Shuler.

Even if the Union had tailored its attack directly against Whitney, so that consumers could identify him as the sole subject of dispute, the broad suggestion that his products not be purchased still necessarily encompassed the entire business of Shuler, the neutral secondary. This is an unlawful end under the Act. *N.L.R.B. v. Salem Building Trades Council (Cascade Employers Ass'n, Inc.),* 163 N.L.R.B. 33, 36 (1967), enforced, 388 F.2d 987 (9 Cir. 1968) (per curiam), cert. denied, 391 U.S. 965.

We have recently held that "where the union chooses to engage in secondary picketing, [it] must accept the burden of properly identifying the struck products." *N.L.R.B. v. San Francisco Typographical Union No. 21* (9 Cir., Nos. 71-1681, 26,042, June 21, 1972), slip op. at 2. Specificity is required to establish a product rather than a general patronage boycott.

Twin City, supra, 422 F.2d at 314-15. Here, the Union made no attempt to confine the impact of its conduct.[2]

There is substantial evidence in the record as a whole to support the Board's findings, and thus its order is valid. The Union's actions threatened Shuler and others with an object to coerce them to cease doing business with Whitney. Such activity constitutes an unfair labor practice under the Act. We enforce the Board's order.

The Contempt Judgment

Section 10(l) of the Act, *supra,* permits a temporary injunction against union conduct pending the N.L.R.B.'s final determination of such a controversy, when there is "reasonable cause" to believe that the union is engaged in an unfair labor practice, and even though the specific questions involved may be of first impression. *E.g., San Francisco Typographical Union No. 21, supra,* slip op. at 4; *Kennedy v. Los Angeles Typographical Union* (9 Cir. 1969) 418 F.2d 6, 8.

It is undisputed that the Union's activity at Oak Hills continued after the July 29, 1970, temporary injunction. We have held above that such subsequent activity constituted picketing within the proscription of the Act. It was in substance and effect no different from the pre-injunction picketing. The District Court, in its findings and adjudication in civil contempt,

[2]It is immaterial whether Shuler had other homes and apartments for sale at other locations. Consumers who acted on the Union's suggestion to boycott the Oak Hills site might have no interest in other locations. Of course, each parcel of real property is unique, and each subdivision serves a unique public interest because of its location and other intangible factors.

ound that the Union's post-injunction conduct vio-
ated the injunction because it threatened or coerced
Shuler and others with an object to cause them to
ease doing business with Whitney. The evidence sup-
orts that finding. Under *Tree Fruit, supra,* the Union
hould have been aware of the limitations on its pick-
ing rights. *San Francisco Typographical Union No.*
supra, slip op. at 5. Good faith is no defense. *Id.*
5.

We cannot say that the factual allegations and legal
ropositions asserted by the Board were "insubstan-
al and frivolous" when it sought the temporary in-
nction. *Kennedy v. Los Angeles Typographical*
nion, supra, at 8; *San Francisco-Oakland News-*
per Guild v. Kennedy (9 Cir. 1969) 412 F.2d 541,
4. Nor can we say on review that the findings and
judication in civil contempt were clearly erroneous.
e, e.g., Donald F. Duncan, Inc. v. Royal Tops Mfg.
. (7 Cir. 1965) 343 F.2d 669, 670; *N.L.R.B. v. Alamo*
press, Inc. (5 Cir. 1968) 395 F.2d 481, 482.

The order of the District Court in No. 71-1439 is
rmed, and the N.L.R.B.'s petition for enforcement
No. 71-2828 is granted.

Appendix C

United States Court of Appeals
For The Ninth Circuit

No. 71-2828

National Labor Relations Board, Petitioner,

vs.

Cement Masons Union Local 337, Operative Plasterers' and Cement Masons' International Association of the United States and Canada, AFL-CIO, Respondent.

[Filed December 19, 1972]

JUDGMENT

Before: CARTER and WALLACE, Circuit Judges, and BYRNE, District Judge*.

This Cause came on to be heard upon the application for enforcement of an order of the National Labor Relations Board dated May 4, 1971, against Respondent, Cement Masons Union Local 337, Operative Plasterers' and Cement Masons' International Association of the United States and Canada, AFL-CIO, its officers, agents, and representatives. The

*Hon. William M. Byrne, Senior District Judge, Central District of California, sitting by designation.

Court heard argument of respective counsel on September 13, 1972, and has considered the briefs and transcripts of record filed in this cause. On October 26, 1972, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order. In conformity therewith, it is hereby

Ordered and Adjudged by the Court that Respondent, Cement Masons Union Local 337, Operative Plasterers' and Cement Masons' International Association of the United States and Canada, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from threatening, coercing and restraining Ted Shuler, doing business as Shuler Investments, by engaging in picketing and handbilling to persuade customers not to patronize or purchase homes sold by Shuler Investments, or threatening to engage in such picketing where an object thereof is to force or require Shuler Investments, or any other persons, to cease doing business with Howard H. Whitney, under circumstances prohibited by Section 8(b)(4)(ii)(B) of the National Labor Relations Act, hereinafter called the Act.

2. Take the following affirmative action which the National Labor Relations Board has found will effectuate the policies of the Act:

(a) Post in conspicuous places at its business offices and meeting halls, including all places where notices to members are customarily posted, copies of the attached notice marked "Appendix."

(b) Furnish to the Regional Director for Region 20 of the National Labor Relations Board, (San

Francisco, California), signed copies of the attached notice marked "Appendix," for posting by Shuler Investments and Howard H. Whitney, if they are willing, at places where they customarily post notices to their employees.

(c) Notify the aforesaid Regional Director, in writing within 20 days from the date of this Judgment what steps the Respondent has taken to comply herewith.

Endorsed, Judgment Filed and Entered
December 19, 1972.
/s/ Dennis R. Mathews
Clerk

A True Copy

Attest: December 29, 1972
Dennis R. Mathews, Clerk
By R. D. Hewitt, Deputy

With costs in this Court in favor of the Board and against the respondent. Costs: One-half claimed cost of brief of the Board $78.30

SO ORDERED

James M. Carter
Shirley M. Hufstedler
Circuit Judges

William M. Byrne
District Judge

Appendix

NOTICE TO ALL OFFICERS, AGENTS AND MEMBERS OF

Cement Masons' Union, Local 337
Operative Plasterers' and Cement
Masons' International Association
of the United States and Canada,
AFL-CIO.

Posted pursuant to a judgment of the United States Court of Appeals, Enforcing an Order of the National Labor Relations Board
An Agency of the United States Government

Pursuant to the Recommended Order of a Trial Examiner and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT, in any manner prohibited by Section 8(b)(4)(ii)(B) of the National Labor Relations Act, threaten, coerce, or restrain Shuler Investments where an object thereof is either to persuade customers not to patronize Shuler, or to force or require Shuler Investments to cease doing business with Howard H. Whitney.

Cement Masons' Union, Local 337
Operative Plasterers' and Cement
Masons' International Association
of the United States and Canada,
AFL-CIO.
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This Is an Official Notice and Must Not Be Defaced by Anyone

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, 13050 Federal Building, 450 Golden Gate Avenue, Box 36047, San Francisco, California 94102. Telephone 556-0335.

United States Court of Appeals
For The Ninth Circuit

No. 71-1439

D.C. No. Civ. 70-1518 LHB

Roy O. Hoffman, Regional Director of the Twentieth Region of the National Labor Relations Board, etc.,
Petitioner-Appellee,
vs.
Cement Masons Union Local 337, Operative Plasterers' and Cement Masons' International Association of the United States and Canada, AFL-CIO, et al.,
Respondents-Appellants.

[Filed November 28, 1972]

Appeal from the United States District Court
for The Northern District of California

JUDGMENT

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the order of the said District Court in this Cause be, and hereby is affirmed.

A TRUE COPY
ATTEST November 17, 1972
DENNIS R. MATHEWS, CLERK
By Emil E. Melfi, Jr., Chief Deputy

Filed and entered October 26, 1972.